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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

NO. 156

Office Supreme Court
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JAMES H. McKEEN

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

MEMORANDUM ON THE PART OF THE PLAINTIFF IN ERROR UPON THE MOTION TO ADVANCE.

CHARLES J. BISSELL,
Attorney and Counsel
for Plaintiff in Error.
Rochester, N. Y.

Supreme Court of the United States.

October Term, 1905.

No. 501.

ROCHESTER RAILWAY COMPANY,

Plaintiff in Error.

against

THE CITY OF ROCHESTER,

Defendant in Error.

MEMORANDUM ON THE PART OF THE PLAINTIFF IN ERROR UPON THE MOTION TO ADVANCE.

This motion is evidently made under Subdivision 7 of Rule 26 of the General Rules of this Court, that special and peculiar circumstances are shown which require the advancement of this cause in the public interest.

While the counsel for the plaintiff in error does not desire to be regarded as in any way opposing this motion, but desires it to be understood that he is anxious that the case should be advanced, if the questions presented are such as entitle it, under the rules of this court, to be advanced, yet he does not think that the statement made

by the counsel for the defendant in error in the notice of motion and in the affidavit upon which the motion is partly based, is entirely accurate in setting forth the questions which are here, nor the results which may follow the determination of those questions.

The writ of error was granted by Mr. Justice Peckham on the 17th day of November, 1905, and the return filed and appearance entered early in the month of December following. The plaintiff in error is a street railroad corporation, created under and by virtue of the general railroad act of the State of New York, being Chapter 252 of the laws of 1884. Early in the year 1890 it took a lease of all the property and franchises of the Rochester City & Brighton Railroad Company and thereafter in the same year, acquired all of its capital stock and filed a certificate in the office of the Secretary of State, provided for by Chapter 503 of the laws of the State of New York for the year 1879 and thereby became by virtue of the act, possessed for all "the estate, property rights, privileges and franchises of the said corporation (the Rochester City & Brighton Railroad Company) . . . as fully and entirely, and without change or diminution, as the same were before held and enjoyed."

It appears by the record that the Rochester City & Brighton Railroad Company was incorporated in the year 1862, under the provisions of the General Railroad Act of the State of New York for the year 1850 and in the year 1862, a franchise was granted to it by the City of Rochester, to construct and maintain a street railroad in certain of the streets of the City of Rochester.

One of the conditions annexed by the city to the enjoyment of the franchise was, that it should, during the continuance of its franchise, improve with such suitable material as the Common Council should direct and in

a proper manner, between the rails of its tracks and for two feet and four inches outside thereof, the streets in which its tracks were used.

It appears further by the record, that it mortgaged its property and franchises, the mortgage was foreclosed, the property and franchises sold, bid in by some of the stockholders who, in the year 1868, incorporated under the laws of the State of New York another street railroad company, to construct, operate and maintain a street railroad in those streets in which the tracks had been laid by the prior company, and in other streets, the corporate name being the same as that of the first company. Thereafter, negotiations were entered into between the Railroad Company and the city authorities, looking to a modification of the condition requiring the Company to pave, and in 1869, pursuant to agreement between the city authorities and the R. R. Co. the Legislature of the State of New York passed Chapter 34 of the laws of that year, entitled "An act for the relief of the Rochester City & Brighton Railroad Company," which is set out in full in the record at pages 26 et seq. This act permitted the railroad company to maintain a railroad in all the streets where its predecessor had a track then laid and with the permission of the Common Council in such other streets, in said city, as it should elect to use for that purpose. The act further modified the provisions of the original franchise, by providing a different rate of fare and section 5 of the act, after providing that the Company should keep the surface of the streets inside the rails of its tracks, in good and thorough repair, provided as follows: "That whenever any of said streets are by ordinance, or otherwise, permanently improved, said Company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street, or streets conform to the grade thereof."

The Rochester City & Brighton Railroad Company acquired a franchise and constructed its road in the two streets referred to in the complaint in this action, for the paving of which this action is brought, long prior to the passage of the General Railroad Act, Chapter 252 of the laws of 1884.

It was conceded upon the trial and in all courts upon the part of the plaintiff in error, that as to all extensions made after the passage of Chapter 252 of the laws of 1884, both the Rochester City & Brighton Railroad Company, and the plaintiff in error, took the franchise, subject to the provisions of that act in regard to the paving, and subject to the provisions of the General Railroad acts, which followed, and which are referred to in the moving affidavit herein, and the position of the plaintiff in error has been from the beginning, that as to all streets in which the Rochester City & Brighton Railroad Company acquired its franchise prior to the passage of Chapter 252 of the laws of 1884, its rights were governed entirely by the provisions of Chapter 34 of the laws of 1869, and that as to those particular streets the Legislature could not repeal the act, or deprive the plaintiff in error of its rights thereunder, as to such particular streets, without violating the provisions of the federal constitution.

Accordingly this action was brought to recover under the general railroad acts of the State of New York, for paving between the tracks and two feet outside, in certain streets in which the Rochester City & Brighton Road had acquired its franchise prior to the year 1884, and the answer set up the specific facts, pleaded the passage of the special act, Chapter 34 of the laws of 1869, and set it out in full and averred that if the general railroad law cast upon the plaintiff in error the duty of making new pavements in the particular streets referred to in the complaint, it was violative of the pro-

visions of Subdivision 1 of Section 10 of Article 1 and the provisions of Section 1 of Article 14 of the federal constitution. (See Record Answer, pp. 9, 23, 36).

The Supreme Court at the trial term held, that the General Railroad laws referred to in the moving affidavit herein, in so far as they deprived or assumed to deprive the plaintiff in error of the exemptions provided for in the special act, Chapter 34 of the laws of 1869, violated the provisions of the federal constitution and dismissed the complaint with an elaborate opinion (record p. 125). This judgment was unanimously affirmed by the Appellate Division of the Supreme Court. The Court of Appeals, by a divided court, standing four to three, reversed the judgment of the Appellate Division and of the special term, and directed judgment for the defendant in error for the relief demanded in the complaint, the facts having all been stipulated. The opinions, both the prevailing and the dissenting opinions of the Court of Appeals, appear in the printed record and are reported at 182 N. Y., 99.

The prevailing opinion in brief held that the General Railroad acts, in so far as they impose the duty of paving upon streets railroads, were an exercise of the taxing power, that the exemption given to the Rochester City and Brighton Railroad from paving, given by the act of 1869, was in the nature of an exemption from taxation.

That the provisions of the act of 1869, exempting the Rochester City & Brighton Railroad from paying for new pavements in the streets which its railroad occupied, was not a contract but was a mere nudum pactum, there being no consideration moving to the state to support its promise.

Again, that if the act of 1869 constituted a contract,

it was a contract personal with the Rochester City & Brighton Railroad Company and the exemption from paying for pavements was a privilege personal to that railroad company, and did not pass to the plaintiff in error under the lease and the very broad provisions of Section 1 of Chapter 503 of the Laws of 1879.

These conclusions are challenged by the assignments of error annexed to and forming a part of the record herein.

It will, therefore, be seen that the questions here to be determined are questions peculiarly between the plaintiff in error and the defendant in error. There is no claim made that the general railroad acts of the State of New York, as a general proposition, in any wise violate the provisions of the federal constitution, but the claim is that these acts, having been held by the highest court of the State of New York to be effectual to repeal the exemptions provided for by the act of 1869, and to deprive the plaintiff in error of the benefit thereof do violate the provisions of the Federal Constitution pleaded to that extent and to that extent only. Whether, as urged by counsel for the defendant in error, there are many other special acts granting practically the same exemptions to other railroad companies in other cities and villages, and that the decision which the court may make in this case, may be used as a precedent in regard to them, counsel for the plaintiff in error is not advised.

It is true that the amount involved in this particular controversy is not, by any means, the measure of what may be lost or gained by either of the parties by reason of the decision herein. It will necessarily be determined by the decision in this action whether the plaintiff in error is liable for the expense of paving in many other streets, which have been paved since this action was be-

gun, and to that extent the delay may be embarrassing to the municipality and to the railroad company.

But as said in the outset, if the court deems this to be a case which, within the meaning of its rule, presents special and peculiar circumstances which warrant its advancement, counsel for the plaintiff in error is perfectly willing that it should be advanced and is anxious for an early disposition. If the court should deem it proper to make such an order, counsel for the plaintiff in error desires to call its attention to the fact that the record is somewhat voluminous, and is not yet printed and asks that it may be set down for a time that will enable the parties to procure the printing of the record and the making and filing of the briefs.

All of which is respectfully submitted.

CHARLES J. BISSELL,
Attorney and Counsel for Plaintiff in Error.
Rochester, N. Y.